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THE PROPOSED INCOME TAX AMENDMENT TO THE FEDERAL CONSTITUTION, DECEMBER 10, 1909.

Gentlemen of the Civic Club:

When the convention of delegates from the several states met in 1787 in Philadelphia, the prevalent idea animating its members, and indeed the whole country, was that the function of that convention would be to amend the existing Articles of Confederation, under which the Revolutionary War had been fought out to a successful conclusion and the Union maintained for ten years, but which experience had proved provided a government too weak to enforce its demands at home or to secure respect abroad. It was hoped that this Convention would be able to suggest such amendments to the Articles of Confederation as would cure these defects, without altering the existing framework of the government.

But the Convention had not been long in session before it became apparent that no hope of ameliorating the condition of affairs was to be expected from a continuation of the principles of government established by the Articles of Confederation, for the weaknesses of that form of government were inherent in its very constitution.

It is beyond the scope of this paper to explain the nature of these defects. Suffice it to say that the Convention early became convinced that they were irremediable by any mere amendments to the Articles of Confederation that could be suggested. It was not a case for patching or repairing, but for rebuilding from the foundation. The delegates, therefore, though recognizing that their powers extended only to the repairing, not the rebuilding, of the edifice, determined to perform the necessary, but unauthorized, task, trusting to the subsequent ratification of their acts by their constituents, the people of the several states, and with the thorough understanding that their action would of itself be binding upon nobody, and would be merely in the nature of a sug-

gestion from an able and distinguished body as to a proper framework of government for the Union.

This, their first difficulty, thus surmounted, the delegates were speedily confronted with others no less threatening.

From the first, the great line of cleavage presented itself between the North and the South, the manufacturing and the agricultural states, the free and the slave, for while slavery still existed *practically*, to a limited extent, in most of the states north of Maryland, and *theoretically* in all of them, save perhaps Massachusetts, the numbers of slaves in those states were diminishing continuously, it having been found there unprofitable to preserve the institution. In the Southern States, on the other hand, from Maryland to Georgia, the slaves were increasing enormously, and at this time formed a very considerable proportion of the entire population and wealth of that section. The differences between the two sections, thus resulting from the divergent economic conditions, were very serious, and ramified through all the relations existing between them.

Still another line of demarcation, no less important than the one just mentioned, speedily showed itself in the debates of the Convention,—the line between the smaller and the larger and more influential states,—the representatives of the smaller, jealous for their independence, fearing that they might be absorbed, or at least their sovereign rights unduly curtailed, by combinations of the stronger.

These and other grave difficulties were finally surmounted by the patience and patriotism of the delegates to the convention, and by the willingness of some to concede to others part at least of what the latter might regard as essential to the safety and welfare of their own states. Without these great mutual concessions, the Constitution of the United States could never have come into being.

Interesting as it might be to trace these compromises to the interstate jealousies and other influences that made them needful, to attempt such an excursion would be to exceed the bounds I have set myself, and to trespass upon your patience.

One of these compromises, however, resulted in that provision of the Constitution, which it is now proposed to amend, and there-

fore calls for our closer consideration. This was the compromise between the North and the South, the free and the slave states, as to the status of the slaves, which I shall now try to make plain to you.

The convention had not long been engaged in its task, when it found itself face to face with two most important subjects. The first was the matter of *taxation*, and the methods to be employed by the proposed new government to raise the revenue necessary to its effective and successful operation. The second was the principle upon which the *representation* of the states in the lower house of Congress should be apportioned.

As regarded *taxation*, it was generally admitted that the power to levy duties on imports should be vested exclusively in the federal government, since, if this were left in the states, those fortunate enough to possess seaports would obtain an overwhelming advantage over those which had them not. It was accordingly agreed to vest this power exclusively in the federal government. The federal Congress was also given power to levy excise taxes, that is, taxes upon commodities manufactured or produced within the country, the tax being levied upon such commodities while they are in the hands of the producer, and before they have reached the consumer.

It is a peculiarity of these forms of taxation, that is, duties upon imports and excise taxes, that, while the goods are taxed in the hands of the importer or producer, and before they have yet reached the ultimate consumer, the burden of the tax really falls upon the consumer by reason of the enhanced price he must pay for the article, the importer or producer simply adding the amount of the tax to the original cost. Thus, the consumer pays the tax ultimately, but since he pays it indirectly and without realizing that he is paying it, such taxes are termed "indirect taxes." This power, then, to levy indirect taxes was vested in the Congress of the United States, but with the express proviso that "all duties .... and excises should be *uniform* throughout the United States," —a manifest precaution to prevent Congress, if ill disposed, from manipulating the excises or rates upon imports to the advantage of one class or section of the country and to the disadvantage of another.

But it was believed that the revenue thus accruing to the federal government would not suffice for its needs, as indeed has proved to be the case from time to time in our history. The most obvious method of supplementing the revenues would be to give Congress, in addition to the power to levy the indirect taxes above mentioned, the further power to levy *direct* taxes upon all persons in the United States and upon property owned by them in proportion to its value, with a proviso in this case, as in that of indirect taxation, that it should be uniform throughout the United States.

Upon reaching this point, the pregnant question presented itself: Should the slaves who formed so large a proportion of the population and wealth of the Southern States, and so small a proportion in the Northern, be classed as *persons* or as *property?*

As regarded the *representation* to which each state should be entitled in the federal Congress, the same question obtruded itself. All recognized canons of good government demanded that the representation of each state in that Congress should be in proportion to population. But in estimating that population, were the slaves to be counted as persons or as mere property?

The Southern delegates insisted that they should be counted as persons, and not as property,—a view which, while increasing the representation of the Southern States in the federal Congress, would rid them of all obligation to pay direct taxes upon the slaves as property. The Northern delegates, on the contrary, insisted that the slaves should be regarded altogether as property, and in no sense as persons, or as part of the population. This view, if adopted, would have very materially increased the South's share of direct taxes, while at the same time seriously diminishing its representation in the Congress.

Which view should prevail, or was it possible to suggest a third, a *tertium quid,* which might bridge over the obstacle, and bring the warring interests of the sections into accord? Unless such a way out were found, the difference of opinion threatened to disrupt the Convention. It was found. The suggestion was made that if a midway point between these two extremes could be agreed upon, so that the slaves, while counting in a reasonable proportion toward population, might also be counted in a like

reasonable proportion as property liable to direct taxation, the compromise would prove satisfactory to both sections. Calculation had revealed that if three-fifths of the total number of slaves were counted as part of the population, the South's representation in the federal Congress would be nearly equal to that of the North, while a like proportion of the slaves, counted as property, would, roughly speaking, equalize the burdens of direct taxation as between the sections, *provided* that direct taxation was in proportion to the population of the several states.

Accordingly, the Convention adopted this compromise, and embodied it in the Constitution in the third section of the first article of that instrument, as follows:

"*Representatives* and *direct taxes* shall be apportioned among the several states which may be included within this Union, *according to their respective numbers,* which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons."

The Constitution, in thus providing that *representation* should be apportioned among the several states according to population, followed the correct principle applicable to that subject, and the requirement that only three-fifths of the slaves should be counted in estimating the population was a mere detail, justified by the circumstances, which did not seriously impair the general principle.

But in their anxiety to adopt the only plan which seemed to promise the successful completion of their labors, the Constitution makers seem to have overlooked, or at least to have been indifferent to, the fact that in providing that direct taxes upon property should also be *apportioned* among the several states according to their respective numbers, they were violating a fundamental maxim of sound taxation, namely, that taxes on a particular subject, to be just, must be *uniform* throughout the territory of the power levying the tax,—a maxim which they had sedulously regarded when they expressly required that all duties and excises should be uniform throughout the United States.

Since the emancipation of the slaves, as the result of the civil war and the passage of the thirteenth amendment, the portion of

this constitutional provision referring to the slaves has entirely lost its significance. With the abrogation of that portion of the clause, the principle of representation is restored in its entirety, the three-fifths excrescence having been simply wiped out. But not so with direct taxation, the true principles of which had been substituted by the absurd and pernicious doctrine that it should be controlled by a rule of apportionment among the states rather than by the rule of uniformity. This egregious error in principle was not in the least eradicated by the emancipation of the slaves, and such taxes are still to be apportioned among the states in proportion to population, the present rule differing from that in force before emancipation only in the fact that now all negroes would be counted in the population instead of three-fifths of them, and that they are no longer to be regarded as property upon which taxes may be levied.

This unfortunate situation makes it so difficult and inconvenient for the federal government to levy a direct tax, and renders the collection of it so unfair and unequal a burden, that it has become a power almost useless to the government, not to be exercised save in times of great distress and emergency.

To illustrate:

Let us suppose Congress wishes to raise ninety millions of dollars by direct taxation, averaging one dollar to each inhabitant. This sum must be apportioned among the several states according to their respective numbers, says the Constitution. If then we suppose Virginia to contain three million people, and New York six million, the result would be that three million dollars of the ninety to be raised must be levied in Virginia, while six millions would be levied in New York. But although the population of New York is only twice that of Virginia, its wealth is perhaps ten, fifteen, or twenty times as great. It is evident then that it would be unjust to require the property in Virginia to bear half as much of the burden as the property in New York.

The injustice of this provision was indeed so palpable and flagrant that the United States Supreme Court, in the first case before it that rendered it necessary to interpret the clause, showed a decided tendency to limit the term "direct taxes" to two classes of taxes only, namely, (1) *Capitation* or poll taxes, that is, taxes

on the person, as such, without regard to the property owned by him; and (2) Taxes upon *land*. Indeed, the first of these, the capitation tax, is expressly designated in the Constitution itself as a "direct tax," in the clause (Article I, § 9, cl. 4) which declares that "no *capitation,* or *other direct tax,* shall be laid unless in proportion to the census or enumeration...." In view of this provision, the Court reasoned that besides the capitation tax, there must be at least one other sort of direct tax in the contemplation of the framers of the Constitution, and since the tax upon land is the most obvious example of a direct tax, the Court held that the phrase "direct taxes" certainly embraced these two, but probably no other.

In the case alluded to as before the Court, the case of Hylton *v.* United States, 3 Dall. 171, decided in 1796, which came up on appeal from the U. S. Circuit Court for the District of Virigina, the facts were that Congress, in 1794, had passed an act entitled "An Act to Lay Duties upon Carriages for the Conveyance of Persons," whereby a uniform tax, in proportion to value, was laid on every such vehicle in the United States. Hylton, the owner of several such carriages in Virginia, refused to pay the tax, on the ground that it was a direct tax, and as such could be validly laid by Congress only by the rule of apportionment among the states, and not by the rule of uniformity.

The Court unanimously held that this was not a direct tax within the meaning of the Constitution, and reinforced its conclusion with this *reductio ad absurdum*. Said the Court: If this is a direct tax, to be levied on the carriages in each state in proportion to its population, it might result that in some states there would be no carriages at all, or not a sufficient number to meet their share of the tax, though every carriage therein be confiscated for the purpose, in which case the people of that state would either pay no tax at all or not their just proportion; and so it might be, if such a tax were laid upon any other specific article of personal property. The only two things, continued the Court, which would certainly be found in each state are persons and land, and therefore the Court inclined to the opinion that taxes on the person, that is, capitation taxes, and taxes on land were the only forms of direct taxation within the meaning of the Constitution, or the contemplation of its framers.

Certainly, the people of the South could have had no quarrel with this conclusion, for if we substitute slaves for carriages in the Court's argument, it not only might have been, but assuredly would have been, true that a direct tax on slaves would have been practically payable entirely by the South.

This decision was followed by a number of others holding that taxes on incomes and on other personal property were not direct taxes, and were therefore subject to the rule of uniformity, not to that of apportionment. (See Veazie Bank *v.* Fenno, 8 Wall. 533; Pacific Ins. Co. *v.* Soule, 7 Wall. 433; Scholey *v.* Rew, 23 Wall. 331; Springer *v.* United States, 102 U. S. 585).

In view of these decisions, extending over a century, which had done so much to ameliorate and render harmless the pernicious doctrine of taxation contained in this clause of the Constitution, it was with amazement and consternation that the statesmen and lawyers of the country received the announcement of the Supreme Court's decision in Pollock *v.* Farmers' Loan & Trust Co., 158 U. S. 601, decided in 1895, to the effect that the Court, by a majority of one, had receded from its former position, and had held, Chief Justice Fuller delivering the opinion, that an act passed by a Democratic Congress in 1894, levying a uniform tax on all incomes above $4,000, throughout the United States, was unconstitutional because it levied a *direct* tax, and had not, in doing so, followed the rule of apportionment among the states, the court also holding that taxes on personal property are direct taxes.

This decision, by a bare majority, and against strong dissent and a long array of precedents, can hardly be said to have disposed of the question finally. But since that time the Republicans have been continuously in power, and they have made no attempt to pass such a law, so that there has been no opportunity to test the sentiment of the Court again upon the subject. Indeed, the Republican leaders seem to be of the opinion that the matter has been definitely settled, since it is a Republican Congress that now proposes to amend this clause of the Constitution so as to dispense with the rule of apportionment in the levy of an income tax.

In Article V of the Constitution, two methods are provided by which amendments to that instrument may be proposed, as follows:

1. Congress itself may propose amendments by a vote of two-thirds of both houses; or

2. On the application of the legislatures of two-thirds of the several states, Congress shall call a convention for proposing them.

Only the first of these methods has ever been used, it being much the simpler, and without the excitement and danger that might attend a meeting of a convention of the people of all the states.

But, in order that an amendment thus proposed should become part of the Constitution, it must be ratified by the people of three-fourths of the states or their representatives in the legislature. Article V of the Constitution provides a choice of two ways of doing this also,—the choice to be exercised by Congress.

1. The proposed amendment may be ratified by the legislatures of three-fourths of the states; or

2. By conventions in three-fourths of the states.

Neither mode of ratification, it will be observed, depends upon the sentiments of a majority of the people of the United States, but only upon those of a majority of the people or legislatures of the several states. Indeed, it is conceivable that amendments may not only be proposed, but actually ratified by the legislatures or conventions of three-fourths of the states, and thus become part of the Constitution, against the wishes of a considerable majority of the people of the United States, provided the majorities in the populous states in favor of the amendments be small.

I mention this interesting possibility because it shows more plainly, perhaps, than any other portion of the Constitution how widely its framers differed in their theory of its organization from the more recent theory, originating in New England, but now finding some favor even in the South, that this is a government of the people of the United States as a nation, and not a government of the people of the several states.

Of these two modes of ratification, Congress has always selected the first, preferring a ratification by the *legislatures*, rather than by the *conventions*, of the states. It is difficult to assign a good reason for this preference. On the contrary, a ratification by a convention of the people of a state, called for the purpose,

would appear to be distinctly preferable, both because of the fact that the members of such a convention would, on the whole, probably be of a higher order of intelligence and standing in their communities, and because, being elected for the single purpose of passing upon the state's ratification, they would be more likely to represent the opinions and wishes of their constituents on that special question, uncomplicated by other issues. Doubtless, the constant choice of the plan of *legislative* ratification by Congress in case of all the amendments heretofore adopted might be traced to the divergent political complexions of the legislatures and the popular majorities in pivotal states.

As concerns the amendment now under discussion, Congress has followed precedent, has itself proposed the amendment by a two-thirds vote of both houses, and has ordered it to be laid before the legislatures of the several states for their consideration and ratification.

The joint resolution of the two houses of Congress, proposing the amendment, reads as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the legislatures of three-fourths of the several states shall be valid to all intents and purposes as a part of the Constitution:

"Article XVI.—The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

Of the wisdom or unwisdom of the amendment it is perhaps presumptuous of me to speak. But I conceive it a duty as well as a privilege to lay before you my own views of its merits, and to aid you as far as I can in reaching correct conclusions with regard to it.

A question has doubtless already arisen in your minds which demands an answer. Why has Congress confined itself to the direct tax on *incomes*, in proposing this change? If an amendment is to be made, why not go the full length, repeal the whole

clause of the Constitution calling for the absurd rule of apportionment in case of direct taxes upon property, and substitute in its stead the rule of uniformity. It may, I think, be assumed with certainty that, but for the troublesome question of slavery, the framers of the Constitution would have authorized Congress to levy direct taxes, as well as indirect taxes, according to the rule of uniformity. To have applied this rule to direct, as well as indirect, taxes would not only have been in accordance with the soundest principles of taxation, but would have given Congress a choice and discretion in the methods of raising revenue, which it has not now, because it is practically confined to revenue raised by indirect taxation, mainly the tariff on imports.

Let us suppose, for instance, that the American people should at some time awake to the realization that the government would be much more economically administered, and that it would in the end be much cheaper for them, if the public revenues were in large measure raised by direct taxation, instead of by a tariff on imports, in other words, if a policy approaching free trade were inaugurated. If the rule of uniformity prevailed as to direct taxation, Congress might at any time adopt such a policy, as the English Parliament adopted it, at the behest of constituents.

But, under present conditions, the vicious rule of apportionment, applicable to direct taxes, blocks the way to such a reform, and the people and Congress must continue, even against their better judgment, to obtain revenue from a tariff on imports, with all its temptation to high protection, extravagance on the part of government and extortion on the part of the domestic manufacturer and the trust.

Why, therefore, I repeat, retain this conditional provision, even partially, since slavery has been abolished, and the occasion that gave rise to the provision has disappeared? Why should the amendment abolish the rule of apportionment as to incomes, while leaving it intact, pernicious principle though it be, as to taxes on land and personal property?

I cannot answer with the certainty of knowledge, but if I may be permitted to hazard a fairly reasonable guess, I should reply that there exist in this country some very powerful interests that are vitally concerned in the preservation, and even in the exten-

sion, of the protective tariff, now bearing so heavily upon the mass of the American people, and that these interests have exerted influence at Washington in opposition to an amendment of the broader scope, because they fear, with the door open to a just and fair system of direct taxation by Congress, that the people would strenuously insist upon the reduction of the tariff, or perhaps might even wish to try the policy of free trade, in the secure knowledge that the government would still have the means of raising revenue, and that the revenue, taken directly from the pockets of the people, instead of by indirect taxation, would be much more economically administered.

Another of the influences inducing Congress to limit the scope of the amendment to a tax on incomes is doubtless to be found in the widely disseminated opinion,—in my judgment, a fallacious one,—that the field of direct taxation has now been fully occupied by the states for the raising of their revenues, and that if Congress were authorized to encroach upon it to any general extent, those subjects might be overcharged with taxation, and disaster result. The answer appears plain. The government must raise so much revenue by taxation. If this be raised by indirect taxation, as by a tariff, the people are paying the tax none the less because they do not realize they are paying it. Revenue by direct taxation has at least this advantage that the people do realize to the full exactly how much they are paying, and will see to it therefore that the government is administered along economical lines. But, as a matter of fact, the amount paid to the *government* by the citizen under the system of indirect taxation, is only a small fraction of all he is made to pay under that system. His toll to the domestic manufacturer or producer upon goods not imported, but made possible by the tariff on imports, not one dollar of which goes to swell the revenues of the government, far exceeds the toll paid by the importer of goods under the tariff, and through him transmitted to the governmental coffers. Let each of you consider for a moment all the various articles you purchase during a year, and divide these mentally into two classes, things actually imported from abroad and those which are not. Your clothing material, your food stuffs, your furniture, watch, pen-knife, pencils, paper, pens, ink, lumber, fuel are pretty much all produced in this

country. Only occasionally do you purchase an article produced abroad and actually imported. But the tariff allows the domestic article to be sold at the same price as the imported article plus the duty. This increased price, when you pay it for an imported article, goes to the government; when you pay it for a domestic article, it goes to the domestic producer or manufacturer, and is that much more than you would have to pay for the same article imported, if there were no duty upon it. You can calculate for yourself how much you are thus required to pay annually, not for the support of the government, but for the private benefit of the domestic producer or manufacturer. If this be duly considered, surely no citizen has reason to fear that a system of direct taxation would lead to overcharging him, as compared with the system now in vogue.

Whatever the reasons, however, Congress has seen fit to propose the amendment in its limited application to the tax upon incomes only. If this authority is granted, it will enable Congress to increase the revenues by perhaps sixty-five or seventy-five million dollars,—hardly more, if the tax is to be a reasonable one.

So small a relative increase in the annual revenues as would be derivable from this source would not carry with it any of the possible advantages that might result from a total repeal of the direct taxation clause of the Constitution. It could not be used, to an appreciable extent, as a weapon to produce an amelioration of tariff conditions, and instead of bringing about a more economical administration of the government, or checking the extortion of the domestic producer or manufacturer, would merely confer upon the government the means of further unnecessary extravagance in such matters as pensions, army and navy or civil service, &c. Indeed, I believe, the *confessed* design of the amendment is to furnish the present administration with more money, the billion dollars a year now expended proving too small an estimate of the expenditures needed to carry out the new and increasingly extravagant demands upon the treasury.

The policy of a rising protective tariff possesses this inherent weakness: There comes a time when the tariff becomes so high as to be prohibitive, or nearly so; importations cease or seriously fall off; and the tariff fails to bring in to the government the

needed revenue, while the people must nevertheless continue to pay increased tribute to the favored domestic manufacturer or producer. This point is reached when the importation of an article ceases to be profitable, that is, when the domestic article may be profitably sold at a cheaper rate than can the imported article, after adding the tariff to the cost of production and importation, with a fair profit. The primary and real function of taxation is to raise revenue, and hence the principles of good government demand that the tariff rate should always stop short of the point of preventing importations altogether, for then the revenue ceases, and even of the point of discouraging importations, for as the importations decrease, so does the revenue.

The federal government, in its prosecution of the policy of a high tariff for purposes of protection instead of revenue, has now reached the point of discouraging the importation of many articles, which accordingly has begun to fall off to such an extent as to cause an alarming deficit in the treasury, but partially compensated by the increased duties on the smaller quantity of goods imported. It is this deficit which it is now sought to equalize by granting permission to tax incomes.

It should be noted that the remedy invoked for this condition, the adoption of a constitutional amendment, is not a temporary, but a permanent, one, and further that it is one the adoption of which involves much trouble and turmoil. I take this extraordinary exertion to discharge the deficit, to convey a veiled declaration on the part of the Republican leaders in Congress that they expect this deficit to recur constantly, as a permanent condition, and that they propose, not only to retain the present high tariff duties, but, as soon as the normal increase of population and wealth in this country shall have caused such an increase in importations as to wipe out the deficit, to extend the tariff still further, until another deficit is created, to be wiped out in its turn by the power now sought to tax incomes.

When the growing deficit then is represented as the alarming symptom of disease in the body politic, the remedy for which is to give the government the power to tax incomes, the reply is that the proposed remedy is a mere quack nostrum, which may cause the symptom to disappear for the moment, but at the ter-

rible expense of increasing the progress of the disease itself, resulting in the later appearance of the same symptoms, intensified and more pronounced.

The disease is not the deficit, but the wrongful administration of a tariff, not primarily for the raising of revenue, but for the benefit of private interests. We must, like the skilled physician, seek to eradicate the disease, not check the symptom merely, like the quack.

It will doubtless be argued that the adoption of this amendment will open a way to the curbing of swollen and ill-gotten fortunes, or at least will compel the owners to pay a larger share of the expenses of government than they now do, and that the poor will be relieved of taxes in the same proportion.

Heed not the syren voice. The spirit of extravagance grows by that it feeds on. It will never be curbed by the feeling of repletion. Its capacious maw constantly craves more. It holds tightly all it has once acquired, and will never release a source of revenue once opened to it, unless forced by long and arduous struggle to disgorge. Let not the poor man then flatter himself that his burdens will be decreased under this amendment, nor that the levy of such a tax will materially check the attainment of ill-gotten wealth. The dishonest man of fortune, on the contrary, will probably escape, without much difficulty, the burdens of the tax, leaving it to fall all the more heavily upon the honorable and the upright.

But these are not the only objections to be made to the proposed amendment. Others, equally serious, may be offered to the terms in which it is drawn. It reads as follows:

"Article XVI. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

To this language I would suggest the following objections, which, to my mind at least, are of sufficient importance to condemn it.

In the first place, the proposed amendment, while definitely abrogating the rule of apportionment as applicable to taxes upon incomes, does not expressly require that such taxes shall be uni-

form throughout the United States. The framers of the Constitution seem to have believed, in the case of indirect taxes, that, unless they expressly declared that all indirect taxes should be uniform, Congress would have power to lay them in a manner not uniform, and therefore they expressly provided in the Constitution that "all duties, imposts and excises shall be uniform throughout the United States" (Art. I, § 8). What is to be inferred from the failure to make this express requirement applicable also to taxes on incomes? Is it not that Congress is not bound to make such taxes uniform, and that it may, if it sees fit, tax incomes in one section of the country at a greater rate than elsewhere. It does not militate against this objection that in ordinary times Congress would not be likely to attempt such a discrimination. There have been periods in our history, as after the civil war, when Congress might have welcomed such a provision as a means of increasing the burdens of a hated section, and such occasions may again arise. At least, the people of the states would act unwisely to subject themselves to such a possibility.

But, in the second place, should we admit that Congress would not dare to perpetrate so glaring and flagrant an injustice as that just mentioned, the amendment still would give that body the power to do practically the same thing in a subtler guise. "Congress shall have power," says the amendment, "to lay and collect taxes on incomes, *from whatever source derived.*" I think it may be fairly assumed that this language confers upon Congress the power to tax income derived from one source, while exempting from taxation income derived from another source. This being true, it would be possible for Congress to tax all income derived from cotton or rice planting, or mining, or farming while exempting from the tax all income derived from other sources. Either of these would cast the burden of taxation unjustly upon one section of the country, while relieving another. If, however, by the words "from whatever source derived" the amendment means to affirm that Congress, in taxing incomes, is to consider the income as an entity, *without regard to the source from which it is derived,* that is, if it is denied the power to tax income derived from one source and exempt that derived from another, this objection would not lie. But in that event, Congress would not have power,

it would seem, to exempt from the tax persons having small incomes, or any part of the income of any one. All income or none must be taxed.

In my judgment, however, the purpose of the words "from whatever source derived," is not to make the income a single indivisible entity to be taxed in its entirety or not at all. Those words were placed in the amendment, with an entirely different purpose, which itself furnishes a strong argument against its ratification. That purpose was to permit Congress to lay a tax on income derived from the interest on state and municipal bonds.

Chief Justice Marshall had early laid it down, in one of his greatest opinions, as an important canon of taxation under our dual system of government, that "the power to tax involves the power to destroy," and that consequently it was beyond the power of the federal government to tax the agencies through which the state governments conducted their affairs, just as, in a corresponding case, it would be beyond the power of a state to tax the agencies of the federal government. (McCulloch *v.* Maryland, 4 Wheat. 316, 431.) Upon the principle thus laid down, it had long been held that a state would have no power to tax United States bonds held by citizens of the states, or the interest or income therefrom, as no limit could be placed on the amount of tax to be levied by the state thereon, if it were once admitted that it had the power to tax them at all, and that so high a tax might be levied as seriously to impair the power of the United States to borrow money by the sale of its bonds.

In the famous Income Tax Case, decided in 1895, to which I have already alluded, Pollock *v.* Farmers' Loan & Trust Co., 158 U. S. 601, the same principle was applied, with the opposite result, to the income tax law of Congress which sought to levy a tax upon income derived from interest upon state and municipal bonds, as well as upon income derived from other sources. The court held that the bonds of a state were agencies through which the state accomplished governmental purposes; that cities and municipal corporations were likewise governmental agents of the state; that their bonds fell within the same rules as did the bonds of the state itself; and that both classes of bonds were exempt from the taxing power of Congress, since otherwise Congress

would have the power to lay so heavy a tax upon them as to impair the power of the states or cities to sell their bonds.

In my opinion, it was to do away with the effect of this decision that the words "from whatever source derived" were inserted into the amendment. At least, the effect of these words is clearly to abrogate the principle enunciated by Marshall, and enforced in the Income Tax Case. If there were nothing else to condemn the proposed amendment, this should suffice. The legislatures of the states are asked to confide to that largely alien body, Congress, the power practically to wipe out or cripple the borrowing power of their states and cities, in order to relieve Congress of an embarrassing deficit induced by its own evil policy, and which it could easily remedy in a year or two, if it chose to recede from that policy. There is a certain impudent audacity in this request of the Republican leaders that throws the only gleam of humor over the situation that this paper has been able to evoke.

RALEIGH C. MINOR,

University of Virginia.